Kroger, Inc. *and* Nicholas Klein

United Food and Commercial Workers, Local 1099, AFL–CIO (Kroger, Inc.) *and* Nicholas Klein.
Cases 9–CA–31116 and 9–CB–8672

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On January 31, 1995, Administrative Law Judge Peter E. Donnelly issued the attached decision. The General Counsel, the Respondent Union, and the Charging Party each filed exceptions and a supporting brief, and the Respondent Union and the Charging Party each filed answering briefs.

On January 22, 1998, the Board issued a Notice and Invitation to File Briefs. Thereafter, on February 11, 1998, the General Counsel and the Respondent Union each filed motions to withdraw exceptions and to remand the proceeding to the Regional Director for compliance. The Charging Party filed an opposition to the motions. By order dated February 23, 1998, the Board granted the General Counsel and the Respondent Union's respective motions to withdraw exceptions and rescinded the invitation to file briefs.[1] However, the proceeding remained pending before the Board on the Charging Party's exceptions.

As the exceptions filed by the General Counsel and the Respondent Union have been withdrawn, we adopt, pro forma, in the absence of exceptions, the judge's rulings, findings, and conclusions with respect to the alleged unfair labor practices. However, in light of the Charging Party's exceptions, discussed below, we have decided to modify the judge's recommended Order as set forth in full below.[2]

The judge found that the Respondent Union violated Section 8(b)(1)(A) of the Act by maintaining in effect a union-security clause requiring that, as a condition of employment, employees become and remain "members in good standing of the Union" without informing unit employees that they are only obligated to pay those fees and dues spent on activities germane to their union's role as bargaining representative. The Respondent Union has withdrawn its exceptions to this finding. However, it must be emphasized that the finding is *not* that the clause is unlawful on its face. To the contrary, the judge said that the clause "appears to be facially valid and lawful."[3] We interpret the judge's decision in light of current law, and find that the Respondent Union unlawfully failed to provide unit employees notice of their rights under *Communication Workers v. Beck*, 487 U.S. 735 (1988). See *California Saw & Knife*, 320 NLRB 224 (1995). As part of his recommended remedy for this violation, the judge ordered the Respondent Union to reimburse the Charging Party, Nicholas Klein, for any dues and fees exacted for nonrepresentational activities. The Charging Party has excepted to the judge's failure to provide all unit employees with reimbursement of unlawfully collected dues. We find merit in this exception only to the extent that we shall provide a *Rochester* remedy[4] to those employees who were initially subjected to union security on or after March 14, 1993, the beginning of the 6-month period preceding the filing of the charge.[5]

With respect to the complaint allegations against the Respondent Employer, the complaint is dismissed.

AMENDED REMEDY

Having adopted, pro forma, the judge's finding that the Respondent Union violated Section 8(b)(1)(A), we shall order it to cease and desist and take certain affirmative action that will effectuate the policies of the Act. In accordance with *California Saw*, supra, we shall order the Respondent Union to notify all bargaining unit employees of their rights under *Beck* and *NLRB v. General Motors*, 373 U.S. 734 (1963).[6] The *Beck* notice shall con-

[1] Member Brame dissenting.

[2] We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[3] The Charging Party excepts to this statement. The exception has no merit. The Charging Party contends that, by maintaining a union-security clause that requires unit employees to be members of the Union in good standing as a condition of employment, the Respondent Union misleads employees about the true nature and extent of their union-security obligations and that the clause must be removed. The complaint, however, did not allege that the union-security provision is invalid. Further, in *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), the Supreme Court rejected the argument presented here asserting the facial invalidity of the union-security clause. The Court held that a union does not violate its duty of fair representation by negotiating agreements that track the language of Sec. 8(a)(3) without explaining, in such agreements, that the Court has held that formal union membership cannot be required, *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963), and that nonmembers cannot be charged dues and fees for nonrepresentational purposes over their objections, *Communication Workers v. Beck*, 487 U.S. 735, 752-754 (1988).

[4] See *Rochester Mfg. Co.*, 323 NLRB 260 (1997).

[5] *Paperworkers Local 987(Sun Chemical Corp. of Michigan)*, 327 NLRB No. 177, slip op. at 3 fn. 10 (1999).

We reject, however, the Charging Party's contention that the Board should order complete restitution of all dues and fees paid by the affected employees. The Supreme Court and Board have held that a union is required to reimburse only those dues determined to be in excess of the amount that it could lawfully collect under *Beck*. See *Group Health Inc.*, 325 NLRB 342 (1998), enf. denied sub nom. *Bloom v. NLRB*, 153 F.3d 844 (8 th Cir. 1998), vacated 119 S.Ct. 1023 (1999); and *Machinists v. Street*, 367 U.S. 740, 771 (1961).

[6] In his recommended remedy, the judge ordered the Respondent Union to provide unit employees with notice of their *Beck* rights. As stated in *California Saw*, however, "*Beck* rights accrue only to nonmembers. Thus, in order to fully inform nonmember employees of their *Beck* rights, a union must tell them of this limitation and must tell them of their *General Motors* right to be and remain nonmembers." 320 NLRB at fn. 57. In *Paperworkers Local 1033 (Weyerhaeuser Paper Co.)*, the Board expressly extended this concomitant notice obligation to all unit employees, including "those who are still full union members and who did not receive those notices before they became members." 320 NLRB 349 (1995), revd. on other grounds sub nom.

tain sufficient information for each accounting period covered by the complaint to enable those employees to decide intelligently whether to object. See, e.g., *California Saw*, supra, 320 NLRB at 233. We shall order the Respondent Union to notify in writing those employees whom it initially sought to obligate to pay dues or fees under the union-security clause on or after March 14, 1993, of their right to elect nonmember status and to make *Beck* objections with respect to one or more of the accounting periods covered by the complaint. With respect to any such employees who, with reasonable promptness after receiving their notices, elect nonmember status and file *Beck* objections with respect to any of those periods, we shall order the Respondent Union, in the compliance stage of the proceeding, to process their objections, nunc pro tunc, as it would otherwise have done, in accordance with the principles of *California Saw*.[7] The Respondent Union shall then be required to reimburse, with interest, those objecting nonmember employees for the reduction in their dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint to which they have objected. We shall further order the Respondent Union to provide Nicholas Klein, as a *Beck* objector, with financial information and additional notice of rights required by *California Saw*. Finally, we shall order the Respondent to reimburse Klein for the dues and fees collected from him that are not germane to the Respondent Union's representational activities. Interest on the amount of proportionate back dues and fees owed to objectors shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, United Food and Commercial Workers, Local 1099, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing to notify unit employees, when they first seek to obligate them to pay fees and dues under a union-security clause, of their right to be and remain nonmembers; and of the rights of nonmembers under *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) Failing to provide unit employees who have filed a *Beck* objection with information about the percentage of the reduction in dues and fees charged to *Beck* objectors, the basis for that calculation, and the right to challenge these figures.

(c) Maintaining in effect rules requiring *Beck* objectors to adhere to internal union procedures as condition precedent to seeking reductions in payments of reduced dues or fees.

(d) Collecting from *Beck* objectors, under the dues-checkoff provisions of the existing contract, either dues or fees for nonrepresentational activities.

(e) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all unit employees in writing of their right to be or remain nonmembers; and of the rights of nonmembers under *Communications Workers v. Beck*, supra, to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

(b) For each accounting period since May 5, 1993, provide Nicholas Klein with information setting forth the Respondent Union's major expenditures for the previous accounting year and distinguishing between representational and nonrepresentational functions.

(c) Notify in writing those employees whom the Respondent Union initially sought to obligate to pay dues or fees under the union-security clause on or after March 14, 1993, of their right to elect nonmember status and to make *Beck* objections with respect to one or more of the accounting periods covered by the complaint.

(d) With respect to any employees who, with reasonable promptness after receiving the notices prescribed in paragraph 2(c), elect nonmember status and file *Beck* objections, process their objections in the manner set forth in the amended remedy section of this decision.

(e) Reimburse, with interest, Nicholas Klein and other nonmember bargaining unit employees who file *Beck* objections with the Respondent Union for any dues and fees exacted from them for nonrepresentational activities for each accounting period since March 14, 1993, in the manner prescribed in the amended remedy section.

(f) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all records necessary to analyze the amount of reimbursement to be paid Nicholas Klein and other nonmember bargaining unit employees covered by paragraph 2(e).

(g) Within 14 days after service by the Region, post at its business offices and meeting halls copies of the attached notice marked "Appendix."[8] Copies of the notice,

Buzenius v. NLRB, 124 F.3d 788 (6th Cir. 1997), vacated 525 U.S. 979 (1998).

[7] Charging Party Klein has already objected, and the Respondent Union failed to give him the required information.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

on forms provided by the Regional Director of Region 9, after being signed by the Respondent Union's authorized representatives, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notice to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Sign and return to the Regional Director copies of the notice for posting by employers, if willing, who are signatory to the collective-bargaining agreement with the Respondent Union at places on their premises where notices to employees are customarily posted.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to notify unit employees, when we first seek to obligate them to pay dues and fees under a union-security clause, of their right to be and remain nonmembers; and of the rights of nonmembers under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

WE WILL NOT fail to provide unit employees who have filed a *Beck* objection with information about the percentage of the reduction in dues and fees charged to *Beck* objectors, the basis for that information and the right to challenge these figures.

WE WILL NOT maintain in effect rules requiring *Beck* objectors to adhere to internal union procedures as condition precedent to seeking reductions in payments of reduced dues or fees.

WE WILL NOT collect from *Beck* objectors, under the dues-checkoff provisions of the existing contract, either dues or fees for nonrepresentational expenses

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify all unit employees, in writing, of their right to be and remain nonmembers; and of the rights of nonmembers under *Communications Workers v. Beck*, supra, to object to paying for union activities not germane to the Union's duties as bargaining agent, and to obtain a reduction in fees for such activities.

WE WILL notify in writing those employees whom we initially sought to obligate to pay dues or fees under the union-security clause on or after March 14, 1993, of their right to elect nonmember status and to make *Beck* objections with respect to one or more of the accounting periods covered by the complaint.

WE WILL process the *Beck* objections of any employees whom we initially sought to obligate to pay dues or fees under the union-security clause on or after March 14, 1993, who elect nonmember status and file such objections with reasonable promptness after receiving notice of their right to object.

WE WILL, for each accounting period since May 5, 1993, provide Nicholas Klein with information setting forth the percentage of the reduction in dues and fees charged to *Beck* objectors, the basis for that calculation, and the right to challenge these figures.

WE WILL reimburse, with interest, Nicholas Klein and other nonmember bargaining unit employees who file *Beck* objections with us for any dues and fees exacted from them for nonrepresentational activities for each accounting period since March 14, 1993.

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 1099, AFL–CIO

James Horner, Esq., for the General Counsel.
John M. Flynn, Esq., of Cincinnati, Ohio, for Respondent Kroger, Inc.
Thomas J. Kircher, Esq., of Cincinnati, Ohio, for Respondent United Food and Commercial Workers, Local 1099, AFL–CIO.
Glenn M. Taubman, Esq., of Springfield, Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charges herein were filed by Nicholas Klein, an individual against Kroger, Inc. (Kroger, the Employer, or the Company) and the United Food and Commercial Workers, Local 1099, AFL–CIO (the Union).

An order consolidating cases, consolidated complaint and notice of hearing thereon issued on October 28, 1993, alleging that Respondent Kroger violated Section 8(a)(1) of the Act by making coercive remarks to employee Nicholas Klein. The consolidated complaint further alleges that the Union violated Section 8(b)(1)(A) of the Act by failing to inform unit employees of the extent of the Union's obligation under the union-security provisions of the contract; failed to provide Klein, pursuant to his request, with information showing the percentage of dues spent on representational versus nonrepresentational expenditures, notwithstanding the fact that he is not a member of Respondent Union; and maintaining a mandatory internal appeal procedure for nonmember objectors to the payment of dues and fees; and instituting a charge and rebate procedure for employees who elect to withdraw their membership or fail to become members of Respondent Union. Further, that

the Union violated Sections 8(b)(1)(A) and (2) of the Act by continuing to collect dues pursuant to a contractual checkoff provision with Kroger from nonmember employees in the collective-bargaining unit for nonrepresentational expenditures. A hearing was held before me on October 3, 1994. Briefs have been timely filed by the General Counsel, the Charging Party, Respondent Union and Respondent Employer, which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

Employer, a corporation, is engaged in the operation of retail grocery stores. During the past 12 months, Respondent Employer, in conducting its operations, derived gross revenues in excess of $500,000, and during this period purchased and received at its Cincinnati, Ohio facility, goods valued in excess of $5,000 directly from points outside the State of Ohio. The Complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the Respondent admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES[1]

Kroger is a retail supermarket chain. The Union represents, under contract, a unit of drug/general merchandise employees at various stores located in Ohio and Indiana.

The effective dates of the most recent contract are October 31, 1993, through June 13, 1998. The effective dates of the prior contract were June 17, 1990, through October 30, 1993.[2] At all times material, articles 3.1 and 3. 2, the union shop and checkoff provisions of the contract read as follows:

> 3.1 Union Shop—It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union in good standing on the execution date of this Agreement shall remain in good standing, and those who are not members on the execution date of this Agreement shall, on the sixty-first (61st) day following the beginning of such employment, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its execution date shall, on the sixty-first (61st) day following the beginning of such employment become and remain members in good standing in the Union. The Employer may secure new employees from any source whatsoever. The term and requirement of "member in good standing," as used herein, is limited to fulfilling the financial obligations imposed by law.
>
> During the first sixty (60) calendar days of employment, a new employee shall be on trial basis and may be discharged at the discretion of the Employer, and such discharge shall not be subject to the Grievance and Arbitration Procedure.
>
> 3.2 Checkoff—The Employer agrees to deduct weekly Union dues, initiation fees and uniform assessment from wages of employees in the bargaining unit, who provide the Employer with a voluntary, written authorization which shall not be irrevocable for a period of more than one year, or beyond the termination date of this Agreement, whichever occurs sooner. Such deductions will be made by the Employer from wages of employees and will be transmitted to the Union by the tenth (10th) of the following month.
>
> In the event no wages are then due the employees, or are insufficient to cover the required deduction, the deduction for such week shall nevertheless be made from the first wages of adequate amount next due the employee, and thereupon, transmitted to the Union.
>
> Upon written request by an authorized representative of the Union, the Employer agrees to dismiss any employee within five (5) days from receipt of such request for failure to comply with Article 3, Section 3.1, limited only by the Labor Management Relations Act of 1947.

Nicholas Klein is a part-time cashier employed by Kroger at its Harrison Avenue store in Cincinnati, Ohio. Klein was hired in May 1988, at which time he joined the Union and executed a dues-checkoff authorization under the terms of the existing collective-bargaining agreement. He worked until about February or March 1990, at which time he left for health reasons, returning as a part-time cashier later in 1990.

Sometime in the spring of 1993, while listening to radio talk show host Rush Limbaugh, he became aware of a U.S. Supreme Court decision holding that he could resign his union membership and pay a reduced "core membership" fee in place of union dues. Thereafter, he contacted and was subsequently advised by the National Right To Work Legal Defense Foundation.

By letter dated May 4, Klein resigned his union membership. That letter reads as follows:

> In accordance with the U.S. Supreme Court's decision in *Patternmakers v. NLRB*, I hereby resign as a member of the United Food Commercial Workers Local #1099, effective immediately.
>
> Under the U.S. Supreme Court's decision in *Communication Workers of America v. Beck,* I hereby declare myself protected by financial-core status as defined in the aforementioned decision of the U.S. Supreme Court.
>
> Please return any reduced dues owed to me, and charge me for the new appropriate amount in compliance with the requirements of *Beck*.

At this time, Klein was having two separate contributions checked off as "Union Dues" deducted from his pay on a weekly basis. One deduction was $4.40 and the second for 64 cents.

By letter dated June 3, 1993, Thomas Bierman, union office manager, responded as follows:

> I am in receipt of your letter and the matter has been taken under advisement.
>
> I am presently away on my honeymoon. However, I will respond to you as soon as possible upon my return to the office.

[1] Upon motion at the hearing, the answer of both Respondent Employer and Respondent Union were amended to admit par. 8 of the complaint alleging that in 1988, Klein executed a dues-checkoff authorization. The Employer also was granted leave to amend its answer to admit that portion of par. 9 of the complaint, which alleges that Klein resigned his union membership by letter dated May 4, 1993.

[2] All dates refer to 1993, unless otherwise indicated.

I appreciate your attention to this letter.

By letter dated August 16, 1993, Bierman again wrote to Klein:

> Your letter of May 4, 1993 in which you resign from Local 1099 and in which you request "financial core status" as defined in the United States Supreme Court's decision in *Communications workers of America v. Beck*, is acknowledged. Please forgive the delay in my response. You are the first member in the history of Local 1099, a local union whose current membership exceeds 13,000 members, who has resigned from our Union under the *Pattermakers* [sic] decision. You are also the first member to request financial core status under the *Beck* decision. Accordingly, it has taken me some time to determine the proper procedure to follow. I apologize for any delay and hope it has caused no inconvenience for you.
>
> Under the law, your resignation tendered in your letter of May 4, 1993, takes effect the day after the postmark of the envelope in which the letter was contained. In your case, your letter was postmarked May 4, 1993 which means that your resignation became effective the following day, May 5, 1993.
>
> Calculations of the reduced fee which you are requesting under the *Beck* decision have been made by an accountant and a breakdown of the expenditures and calculations for the fiscal year 1991 will be furnished to you if you object. Based on these calculations, your reduced fee would be 92.7 percent of normal dues.
>
> Apply this percentage to you, the reduction would be .33¢ per week. I arrived at this amount by considering the normal dues per week and multiplying that by the percentage mentioned above, with the difference being .33¢.
>
> I am enclosing a check in the amount of $5.14. This check represents a difference between the reduced amount and regular dues for the months of June, July and August and as well as this difference pro-rated for the days in the month of May from the effective date of your resignation forward. I will advise the Kroger Company, your employer, of the reduced dues amount so that this amount, rather than the normal dues, will be deducted from your pay. However, it is necessary that you also authorize the Company to do this.
>
> The reduced fee represents only that portion of Local 1099's expenditures devoted to collective bargaining, contract administration, grievances and arbitration, and other matters affecting wages, hours, and other conditions of employment. These are called "chargeable" expenditures and will include, for example: the costs of negotiations with employers; informal meetings with employer representatives; communication of work-related issues with employees; handling employees' work-related problems through the grievance and arbitration procedure; lobbying on matters directly related to conditions of employment; and union administration.
>
> The cost of such activities as community services, lobbying on issues that benefit represented employees and their families as citizens rather than as workers, recruiting members, organizing and member-only benefits are called "non-chargeable" expenditures. The fee reduction will represent these expenditures.
>
> The reduced fee will be reviewed annually and adjusted, if necessary.
>
> Service fee payers have the right to contest the calculation of the reduced fee and to obtain a review of the calculation. This procedure is initiated by submitting: (1) a reduction request for a further reduction in the fee and the amount of the reduction sought; and (2) requesting a hearing to determine the accuracy of the reduction. Such a challenge must include the employee's name, home address, Social Security number, job title, department, work location and office and home phone numbers. The request for reduction and hearing request must be received by the local union at 913 Lebanon Street, Monroe, Ohio 45050 within 30 days of the date of this letter.
>
> The first step of the appeal process is a hearing before Local 1099's Executive Board. This hearing will be held within 60 days of the receipt of the challenge and multiple challenges may be consolidated. Those requesting an additional fee reduction will have an opportunity to explain to the Board why they believe their fee should be reduced further. The Board will consider all of the evidence and issue a decision in writing within 15 days of the hearing.
>
> If the challenger is not satisfied with the Executive Board's decision, he or she must appeal to the local union in writing within 15 days of the date of the Executive Board's decision. The matter then will be submitted to arbitration before an impartial fact-finder appointed by the American Arbitration Association. Challenges may be consolidated into a single hearing. The hearing will be conducted under the AAA's Rules for Impartial Determination of Union Fees, and will be held within 120 days of the date the challenge is received at the local union office. Local 1099 will pay the arbitrator's fee.
>
> Once a written challenge is received, Local 1099 will placed an amount equal to the challenger's requested reduction in the reduced fee into an interest-bearing escrow account. It shall remain in that account until the impartial fact-finder issues a decision. Should the decision lower the percentage of chargeable expenditures, the appropriate portion of the escrowed fees, plus interest, will be refunded to the challenger. All reduced service fee payers will then pay the adjusted fee amount as determined by the fact-finder. If the fact-finder approves the union's calculations, the escrowed money and interest will revert to the local union.
>
> If you have any questions about any of the matters covered in this letter, please contact me at the local union office.

Klein was not satisfied with Bierman's response and expressed himself by letter dated September 2, reading:

> I am in receipt of your letter dated August 16, 1993.
>
> I do object, under *CWA v. Beck*, to your 92.7% calculation, and I request that you immediately send me a detailed breakdown of how that number was calculated, for all levels of the union hierarchy including the UFC International and all other facilities.
>
> Additionally, while I do challenge your 92.7% figure, I must inform you that I have no intention of pursuing any hearing or other internal "appeal" before the Executive Board of the union, and I do not believe that I can be re-

quired to do so under the law. Rather, I will pursue my challenges in a forum of my own choosing.

In any event, I trust that you will promptly send me the detailed financial disclosure discussed above.

It is undisputed that Klein was never provided any additional information by the Union in response to this letter. Thereafter, Klein's paycheck stubs reflect two separate deductions for "UNION DUES" of $4.07 and 66 cents.

Upon receipt of Bierman's August 16 letter, Klein called Bierman to inquire about the uses for which the second dues' payment of 66 cents (raised from 64 cents) was being used. Klein testified that Bierman told him that the purpose was to support organizing and advertising activities of the Union.[3] Klein was also told that the *Beck* information he sought would not be ready until October of 1993.

It appears that normally, once an employee is hired, he executes a union membership application and dues-checkoff authorization at the place of his employment. Kathy Oberschlake, office manager for the Union, testified that if, for whatever reason, this was not done at the workplace, those documents, along with a letter captioned "WELCOME TO UFCW LOCAL 1099" is sent to the employee. This letter, in use since about June 1992, generally extols the benefits of Union membership and contains the following two paragraphs relevant to this case:

> You may also want to know that in accordance with court decisions, you have the right to refrain from being a member of the Union and to pay an initiation fee and a monthly dues fee that is somewhat less than the full initiation fee and regular monthly dues. Those fees only reflect the Union's cost of representing the employees in the bargaining unit. Please notify us if this is the route you choose, and you will be provided additional information.
>
> You should also be aware, however, that exercising this options means that you would not have the right to vote on your contract or to participate in the development of contract proposals of Local Union elections, You will also lose other benefits of Union membership. Local 1099 hopes that you will choose to become an active member and strengthen the Union's ability to represent you and your co-worker's, rather than weakening the Union and making it more difficult to represent you. In our Democratic Union the decision is yours.

A. The 8(a)(1) Allegation

After his resignation from the Union, sometime in mid-June 1993, Klein spoke with Lisa Creamer, comanager of the Harrison Avenue store. He told Creamer that he had resigned from the Union and was now paying reduced dues and asked if they would get into trouble over this. Klein could not recall her response but testified that she did not say he would have to pay full dues or remain a union member in order to retain his job, but that she did say she had not heard about having a choice of not joining the Union or having reduced fees.[4]

B. Discussion and Analysis

1. Failure to inform employees

The General Counsel contends that Respondent violated Section 8(b)(1)(A) of the Act in failing to inform unit employees of the extent of their obligations as unit employees under the union-security provisions of the contract. A brief review of relevant precedent is in order.

The union-security provisos to Section 8(a)(3) of the Act provide, inter alia, that employees may be required, as a condition of their employment, to become and remain union members, including the obligation to pay union dues and initiation fees.

In *General Motors*,[5] the Supreme Court interpreted the requirement that employees become and remain union members under the provisos to Section 8(a)(3). In *General Motors*, the Court held that employees need not retain union "membership" in order to retain their employment so long as they pay the equivalent of union fees and dues under what is known as an agency shop agreement. The Court held: "It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership,' as a condition of employment, is whittled down to its financial core."[6]

With respect to the notification of employees, the Board in *Electronic Workers IUE Local 444 (Paramax Systems Corp.)*, 311 NLRB 1031 (1993), held that where a collective-bargaining agreement's union-security provisions require that unit employees become and remain "members of the union in good standing" as a condition of their employment, each unit employee must also be apprised, in writing, of his or her *General Motors* rights, i.e., "that the only required condition of employment under the union-security clause is the tendering of uniform initiation fees (if any) and dues."[7]

In the *Beck* case,[8] the Supreme Court went beyond its holding in *General* Motors and concluded that a union could not, over the objection of dues-paying nonmember employees, exact or expend dues or initiation fees beyond those necessary for the union to perform its duties as a collective-bargaining representative of the unit employees. However, even though *Paramax* was decided after *Beck*, the issue raised by *Paramax* was whether or not unit employees had been properly apprised, not of their rights under *Beck*, but only of their rights under *General Motors*. The Board specifically noted that it was not deciding issues raised by the *Beck* case.[9]

In short, the issue left unresolved by the *Paramax* case is raised by the instant case, to wit, did the Respondent violate Section 8(b)(1)(A) of the Act by maintaining a union-security provision requiring that unit employees become and/or remain members in good standing without apprising them of their *Beck* rights to pay only for those activities germane to its function as collective-bargaining representative of unit employees; i.e., collective bargaining, contract administration, and grievance adjustment. In my opinion, the Union has failed to provide such notice. It requires no deep analysis to conclude that under both *Beck* and *Paramax*, unit employees must be advised of their rights. The Union has a fiduciary duty to provide such notice. There exists a direct and controlling analogy between *Paramax* and the instant case. Notice to unit employees was required in *Paramax* and so also was notice of *Beck* rights re-

[3] Bierman did not testify and, having reviewed the entire record, I credit Klein's unrebutted testimony.

[4] Since Creamer did not testify, I credit Klein's unrebutted account.

[5] *NLRB v. General Motors*, 373 U.S. 734 (1963).

[6] *N.L.R.B. v. General Motors*, supra, 373 U.S. at 742.

[7] 311 NLRB at 1043.

[8] 487 U.S. 735 (1988).

[9] 311 NLRB at 1033 fn. 6 and 1037 fn. 30.

quired in the instant case. It was not provided, and the Union's failure in this regard violates Section 8(b)(1)(A) of the Act..

However, Respondent contends that General Counsel had a burden, which it failed to meet, of showing that the union employees in the instant case, except for Klein, were not advised of their *Beck* rights by the Union. This contention lacks merit. While the union-security provisions in the instant case, as in *Paramax*, appear to be facially valid and lawful, when such union-security provisions exist, there is also an affirmative obligation arising from its duty of fair representation to unit employees for the Union to advise unit employees of their *Beck* rights, which the Union in this case has failed to provide. It is not the General Counsel's burden to show that each individual unit employee was not given the requisite notice in order to make its case. The Union has an affirmative fiduciary duty to provide notice and it failed to do so.

Respondent also argues that it distributed to new employees, beginning in about June 1992, an application for dues-checkoff authorization to which was attached an informational covering letter, including the language set out above, concerning unit employees' rights to core membership and the financial obligations of such an election. Respondent argues that this notice is sufficient to provide whatever notice may be required to inform unit employees concerning their right to opt for "core" membership. I disagree. Even assuming, arguendo, that the notice was sufficient, it was distributed only to new employees, beginning in about June 1992, for the purpose of obtaining dues-checkoff authorizations. It is totally insufficient to satisfy written notice requirements as to any employees hired prior thereto or who may not have seen the letter.

Respondent also argues that the labor agreement itself is sufficient notice of any *Beck* right since it defines the term and requirement of "membership in good standing" as limited to "fulfilling the financial obligations imposed by law." I do not agree. Respondent's obligation requires written notice advising each unit employee that dues and initiation fees may not be exacted or expended on activities beyond the Union's collective-bargaining function. In my opinion, the contract language cited above is general, unfocused, and totally insufficient to meet that obligation.

2. Failure to provide financial documents

The General Counsel and the Charging Party contend that the Union violated Section 8(b)(1)(A) of the Act by failing to provide to Klein, upon his request, financial documentation showing what percentage of his union dues was spent on representational as opposed to nonrepresentational items.

In *Beck*, the Supreme Court stated:

> We conclude that § 8(a)(3), like its statutory equivalent, § 2, Eleventh of the RLA authorizes the exaction of only those fees and dues necessary to "performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues." *Ellis*, 466 U.S. at 448.[10]

This proposition having been established, it would appear that financial core members would be entitled to know whether or not any of the monies being exacted from them for initiation fees or dues are being used for nonrepresentational matters prohibited by *Beck* as opposed to those used for legitimate representational purposes, which would be lawful. It seems to me that basic fairness demands that a core member be able to determine whether or not money being taken from him pursuant to a dues checkoff is being used for lawful or unlawful purposes and he should be provided with sufficient information to enable him to make that determination.

While *Beck* does not deal with procedural requirements, it does contemplate, as set out above, that only those fees used for representational purposes may be "exacted" from core members. It would seem to follow that some sort of preexaction or precollection information be provided upon request to unit employees opting for financial core membership.

This conclusion is supported by the Supreme Court's decision in *Chicago Teachers Union Local 1 v. Hudson*, 475 U.S. 292 (1986), where the Court held that potential objectors were entitled to "sufficient information to gauge the propriety of the Union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*" [footnote omitted].[11]

The fact that *Hudson* was decided under First Amendment criteria certainly does not preclude a finding that the same union procedures may also be viewed as unlawful under Section 8(b)(1)(A) of the Act. While I recognize that the failure to provide sufficient information in *Hudson* was held by the Court as a failure to afford core members the safeguards provided by the First Amendment to the Constitution, the concept of a union's duty of fair representation under Section 8(b)(1)(A) of the Act is capable of affording to employees many of the same protections. While the analogy between a core member's First Amendment rights and the right to fair representation under Section 8(b)(1)(A) of the Act may not be direct, concepts of basic fairness are common to both. In my view, the Union's duty of fair representation includes the obligation to provide members with sufficient information to enable them to form a judgment about the propriety of the fees they will be charged for their representation.

In these circumstances, I conclude that Klein was entitled to more information than he received. Respondent's letter of August 16, was conclusionary and summary in form, simply reciting a reduced fee of 92.7 percent of normal dues for various activities described as chargeable and stating that the 7.3 percent (reduced fee) was for nonchargeable expenditures as set out in the letter. This information was an inadequate response and did not meet the minimal standards set out in *Hudson*, supra, which I conclude to be appropriate criteria for application in the instant case.

Respondent also argues that no violation should be found based on its failure to provide information in circumstances where Klein had been advised that the *Beck* information he sought would be provided at a later date and he chose not to wait for that information but, instead, filed an unfair labor practice charge without following the internal appeal procedures set out in Bierman's letter of August 16. This contention is without merit. Klein was not obliged to wait until the Union decided to give him the information before filing a charge. Moreover, the record discloses that the information was never provided, and Klein was fully justified in filing the unfair labor practice charge. Nor was Klein obliged to follow the internal procedures established by Bierman's letter of August 16 in

[10] 487 U.S. at 762, 763.

[11] *Hudson*, supra at 306.

order to obtain the information, particularly where the Union's maintenance of these procedures, as set out below, were themselves unlawful.

Moreover, there was a second weekly deduction for dues in the amount of 66 cents for which no information at all was provided, not even mentioned in Bierman's letter of August 16, 1993. Upon later inquiry, Klein was advised by Bierman that the second dues' deduction in the amount of 66 cents was for "advertising" and "organizing." Clearly, these are not allowable expenses under *Beck* since they are not related to the representation of bargaining unit employees. In this regard, see *Ellis v. BRAC,* 466 U.S. 435 (1984).

In summary, Respondent Union violated Section 8(b)(1)(A) of the Act by failing to provide Klein with sufficient information, thereby denying him the opportunity to adequately evaluate the propriety of his dues or to intelligently protest.

3. Internal union appeal and rebate procedure

As noted above, any core member challenging the reduced fee calculation was obliged to submit to the Union a request for additional reduction and the amount of the further reduction sought, and to request a hearing before the union executive board where the challenger would be provided an opportunity to explain his or her position. The challenger must then appeal any adverse decision to the Union in writing, and thereafter the matter would be submitted to an arbitrator appointed by the AAA. The procedure set out by the Union also provides that upon receipt of a core member's challenge, an amount equal to the additional reduction requested by the challenger would be escrowed and dispersed appropriately pursuant to the final resolution of the amount.

The General Counsel and the Charging Party contend that the Union may not require core members to observe these internal union appeals in order to contest the amount of any dues' reduction. I agree.

Klein resigned his Union membership on May 4, 1993. Thereafter, he was obligated only to pay a reduced fee for his representation by the Union. Klein was not a full union member, but was a core member. He was not, in my opinion, obligated to follow internal procedures established by the Union. Moreover, this is not union contract matter. Questions concerning the refusal to provide financial information to core members about the propriety of any reduced fee is not a matter within the terms of the contract.

The General Counsel and the Charging Party also allege as unlawful Respondent's institution of a "charge and rebate" procedure for core employees. The procedure set out in Respondent's letter of August 16, 1993, contemplates the collection of the entire reduced fee amounts.[12] As noted above, core members dissatisfied with these reduced fees may protest and the reduction sought would be placed in escrow pending, ultimately, an arbitrator's decision. In my opinion, the charge and rebate process also violates Section 8(b)(1)(A).

In *Beck*, supra, the Supreme Court held, inter alia, that unions were entitled, as noted above, to "the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor management issues.' *Ellis*, supra, 466 U.S. at 448." In *Hudson*, supra at 310, the Court concluded that in order for the Union to *collect* agency fees, it was *first* required to provide objectors with an "adequate explanation for the basis of the fee." In my opinion, this is an appropriate procedural safeguard.[13] Klein, although he made the request, was never provided with an "adequate explanation" and, in my opinion, the Union was required to provide such an explanation. Having failed to do so, the Union could not lawfully "exact" or "collect" any reduced fees. Thus, by maintaining internal procedures, including the charge and rebate procedures discussed above, Respondent Union violated Section 8(b)(1)(A) of the Act.

I further conclude that the exaction of such dues, without providing Klein any adequate explanation for the basis of its computations constitutes discrimination in violation of Section 8(b)(2) of the Act.

Respondent also argues that any reduced fees acquired under the dues-checkoff procedures were obtained with the permission of the Charging Party and therefore were proper. I do not agree. As a core member, Klein was entitled upon request, as set out above, to information sufficient to enable him to evaluate the amount of the reduced fee. This information was not provided. Klein has continuously objected to the use of dues or fees for nonrepresentational purposes. In these circumstances, it is my opinion that Respondent could not thereafter lawfully continue to take the full unilaterally arrived at reduced fee amounts, even though ultimately providing a rebate for any additional reductions, and Klein's dues-checkoff authorization cannot be interpreted as providing Klein's permission to do so.

In summary, whatever uncertainties may have existed as to the legal rights of core members, these doubts have been laid to rest. The right to opt for core membership and pay reduced fees was established in *Beck*. It follows, as a matter of basic fairness, that the Union should not be able to frustrate or interfere with those rights by erecting procedural obstacles. In my opinion, requiring core members to observe an internal union appeals process as a precondition to impartial consideration of reduced fee protests is unlawful, and, in those circumstances, continuing to receive dues under the checkoff provisions of the contract violates Section 8(b)(1)(A) and (2) of the Act.

4. The 8(a)(1) Allegations

With respect to the contention, as alleged in the complaint, that Store Manager Lisa Creamer told Klein that the bargaining unit "did not have any choice other than to become members of Respondent Union and pay dues and initiation fees," I conclude that the record simply does not support this allegation. At worst, even fully crediting Klein, he was told by Creamer only that she had not "heard" about any choice. This is tantamount to answering that she was unaware of the *Beck* case. Simply responding to Klein that she was unaware does not violate the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent Union set forth in section III above, occurring in connection with Respondent Union's operations described in section I above, have a close and intimate relationship to trade, traffic and commerce among the

[12] For Klein, this was only 33 cents per week less than full dues.

[13] As noted above, while *Hudson* was decided under Art. I of the Constitution, it is my opinion that the conclusions reached in that case are appropriate resolutions to the issues raised by the instant case even though the issues raised herein arise under Sec. 8(b)(1)(A) of the Act as violations of the Union's duty to fairly represent all unit employees.

several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent violated Sections 8(b)(1)(A) and (2) of the Act, I shall recommend that it cease and desist therefrom and from engaging in any like or related conduct and that it post an appropriate notice, signing additional notices for posting by the Employer, should the Employer so desire. Specifically, I shall recommend that Respondent be ordered to notify each unit employee, in writing, of their employee rights under the *Beck* case as set out below in the "ORDER."

I have concluded that Respondent Union was obliged, upon request, to provide Klein after he resigned from the Union and opted for core status with an adequate explanation of the basis for his reduced dues. Since it appears that full reduced dues, in amounts determined by the Union, have been taken and continue to be taken from Klein's pay under his dues checkoff, any appropriate remedy should include reimbursement and I shall order that Respondent reimburse Klein for all such reduced fees collected since May 4, 1993. Such reimbursement, with interest, shall be computed in the manner described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), and *F. W. Woolworth Company*, 90 NLRB 289 (1950).

Further, since I have concluded that either 66 or 64 cents was being checked off for unlawful nonrepresentational purposes, I shall recommend that Klein be reimbursed for those amounts.

CONCLUSIONS OF LAW

1. Respondent Kroger, Inc., is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

2. Respondent United Food and Commercial Workers, Local 1099, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the Union has represented under contract a unit of drug/general merchandise employees at various stores located in Ohio and Indiana.

4. Respondent violated Section 8(b)(1)(A) of the Act by maintaining a union-security clause in effect requiring that as a condition of employment, employees become and remain "members in good standing of the Union" without informing unit employees that they are only obligated to pay those fees and dues necessary for the Union to perform the duties of an exclusive representative of the employees in dealing with the Employer on labor management issues.

5. Respondent violated Section 8(b)(1)(A) of the Act by failing to provide Nicholas Klein upon his request, at the time he resigned from the Union and elected core member status, with information providing an adequate explanation for the basis of his reduced fee.

6. Respondent violated Section 8(b)(1)(A) of the Act by maintaining in effect rules requiring core member unit employees to adhere to internal union procedures as a condition precedent to seeking reductions and payments of reduced fees.

7. Respondent, since May 4, 1993, has been and is violating Section 8(b)(1)(A) and (2) of the Act by collecting from Nicholas Klein, under the dues-checkoff provisions of the contract, reduced fees in amounts unilaterally determined by the Union.

[Recommended Order omitted from publication.]